Medieval Knights, LLC *and* Actors' Equity Association and Local 632, International Alliance of Theatrical and Stage Employees, Joint Petitioner. Case 22–RC–12727

June 29, 2007

DECISION AND CERTIFICATION OF RESULTS OF ELECTION

BY MEMBERS SCHAUMBER, KIRSANOW, AND WALSH

The National Labor Relations Board, by a three-member panel, has considered objections to an election held on September 22, 2006, and the hearing officer's report recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 16 for and 18 against the Joint Petitioner, with 2 challenged ballots, an insufficient number to affect the election results.

The Board has reviewed the record in light of the exceptions[1] and briefs,[2] and contrary to the hearing officer's recommendation, has decided to overrule Petitioner's Objection 5 and to certify the results of the election.

Objection 5 alleges that at a meeting held during the critical period, the Employer advised employees that "should the Union win the election, the Employer would drag out negotiations for at least a year," thus threatening employees that electing the Union as their bargaining representative would be futile. As explained below, we find that under the circumstances of this case, the Employer's conduct was not objectionable.

[1] The Employer has excepted to some of the hearing officer's credibility findings. The Board's established policy is not to overrule a hearing officer's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Stretch-Tex Co*., 118 NLRB 1359, 1361 (1957). We find no basis for reversing the findings.

In the absence of exceptions, we adopt pro forma the hearing officer's recommendations to overrule Petitioner's Objections 2, 3, and 6. The Petitioner withdrew Objections 1 and 4 before the hearing.

[2] In its posthearing brief, the Petitioner raised an "additional objection." The hearing officer found that the allegation was not sufficiently related to the Petitioner's Objections identified by the Regional Director's order directing a hearing in this case. In addition, he found that the issue was not fully litigated. He therefore recommended that the objection not be considered on its merits. The Petitioner has excepted to that recommendation. We adopt the hearing officer's recommendation and deny the Petitioner's exception.

I. BACKGROUND

The Employer's business involves staging performances of medieval events such as jousting and swordplay. On August 9, 2006,[3] Actors' Equity and IATSE Local 632 filed a joint petition seeking to represent a unit of "show" employees at the Employer's Lyndhurst, New Jersey facility. The petitioned-for unit included Knights, Squires, and the show cast (musicians and stable hands).

The record reflects that sometime near the end of August, the Employer hired labor consultants Peter List and James Hulsizer to "educate" employees and management about the election process. Witnesses stated that List and Hulsizer were introduced to the employees on or about August 24, and they came to the "castle" several days a week up to the day of the election. During that time, they were generally available to employees to answer questions about the campaign and other labor relations issues. In addition, they held scheduled meetings on Thursdays and Fridays with separate groups of Knights, Squires, and members of the show cast to discuss specific aspects of the election process and union representation.

At meetings held on September 14 and 15, the week before the election, List conducted an exercise on collective bargaining in which he described the process and used a flip chart with columns listing bargaining issues important to hypothetical employees, unions, and employers. During the presentation, List stated, among other things, that an employer did not have to agree to any specific proposals, that all negotiations were different, and that the bargaining process could take weeks, months, or even more than a year. According to credited testimony, List said that during negotiations, "an employer, by giving into lesser items or addendums on the contract, would be able to stall out the negotiations because they would still be bargaining in good faith but not really agreeing to anything, agreeing to things like a bulletin board for the union at the jobsite, agreeing to restricted bargaining unit work, things like that, that would make them show they were bargaining in good faith but not really getting anything done." Although witnesses could not remember List's exact words or whether he said that the fictional company "could" or "would" engage in such bargaining tactics, it was undisputed that List's presentation was about a hypothetical employer, and at no time did he say that Medieval Knights would engage in any particular bargaining conduct.

II. DISCUSSION

The Board has consistently held that, absent threats or promise of benefits, an employer may explain the advantages and disadvantages of collective bargaining in order

[3] All dates are 2006 unless otherwise indicated.

to convince employees that they would be better off without a union. See, e.g., *Langdale Forest Products Co.*, 335 NLRB 602 (2001) (employer's newsletter, noting that employees at its nonunion facilities received greater wage increases than employees at its union facility, did not violate Sec. 8(a)(1)). In this case, the evidence does not support a finding that the Employer threatened employees or suggested that electing the Union as their bargaining representative would be futile, as alleged.

As noted above, it is undisputed that List's remarks were made during an exercise involving hypothetical bargaining parties, and there is no evidence that List threatened or suggested that the Employer would engage in the bargaining conduct described in the exercise. On the contrary, List stated that all negotiations are different and that the bargaining process could take a week, a month, or a year. See *Manhattan Crowne Plaza*, 341 NLRB 619, 620 (2004). Employees attending the meeting could recognize that it was an exercise and not a depiction of Medieval Knights' actual bargaining strategy. The Board has found that employees can distinguish between a hypothetical exercise about bargaining and an employer's description of its actual or planned bargaining strategy. See *Days Inn Management Co.,* 299 NLRB 735, 740 (1990) (noting that employees understood that a skit depicting a bargaining session was merely an encapsulation of a longer and more complex process), enfd. in relevant part, enf. denied on other grounds 930 F.2d 211 (2d Cir. 1991).[4]

In addition, witnesses testified that they could not remember the exact words List used during the presentation to describe the hypothetical employer's bargaining conduct. As the hearing officer noted, Petitioner's witness Steve Mellifont could not remember whether List said a company "could" or "would" seek to extend negotiations. We are unable, therefore, to rely without question on the exact words of Mellifont's recollection of List's statements.

The Board has generally found that descriptions such as List's bargaining scenario merely point out "the possible pitfalls for employees of the collective-bargaining process." *Standard Products Co.*, 281 NLRB 141, 163 (1986), enfd. in part, enf. denied in part on other grounds 824 F.2d 291 (4th Cir. 1987) (quoting *Coach & Equipment Sales Corp.*, 228 NLRB 440 (1977)). In *Manhattan Crowne Plaza,* supra, the employer informed employees, 1 week before the election, that union members at another hotel were fired and replaced when the parties failed to reach an agreement after over a year of negotiations. The Board found that the employer's conduct was not unlawful because it merely provided employees with a concrete example of a potential negative outcome to electing a union.[5] Similarly, in *Standard Products Co.,* supra at 162, the employer's plant manager told employees that, if the union won the election, he would "be sitting at the bargaining table and everything that is asked, I can say no, no, no." The Board affirmed the judge's finding that the manager's remarks did nothing more than portray the pitfalls for employees of the collective-bargaining process. Id. at 163. We find that the statements attributed to List and relied on by the hearing officer are similar to these statements that the Board has found to be unobjectionable.[6]

In light of the above, we find that the Employer's statements in this case were not objectionable. We therefore overrule Petitioner's Objection 5. Accordingly, as the Petitioner failed to secure a majority of the valid ballots cast, we certify the results of the election.

CERTIFICATION OF RESULTS OF ELECTION

IT IS CERTIFIED that a majority of the valid ballots have not been cast for Joint Petitioner Actors' Equity Association and Local 632, International Alliance of Theatrical and Stage Employees, and that it is not the exclusive representative of these bargaining-unit employees.

[4] Our dissenting colleague believes that "it is not likely" that employees can make such a distinction. Like previous Boards, we disagree.

[5] In *Manhattan Crowne Plaza,* the Board specifically rejected the Regional Director's claim that the employer "clearly implied" that it would engage in the same conduct as that of the other hotel's employer. Similarly, we reject our dissenting colleague's speculation that the "clear implication" of List's bargaining exercise was that Medieval Knights would engage in the same bargaining conduct as the hypothetical employer. That the employer in *Manhattan Crowne Plaza* related what another employer had done, whereas List spoke of what a hypothetical employer might do, is a distinction without a difference. In both cases, the employer told a story about *an* employer's conduct. In *Manhattan Crowne Plaza*, the Board declined to infer that *the* employer thereby implied that it would do likewise. We also decline to draw a similar inference here. In addition, because List did not state or imply that the Employer would adopt any particular bargaining strategy, he had no duty, as the dissent suggests, to expressly state that the Employer would "eschew the bargaining approach he laid out."

[6] It is undisputed that List made no statements, promises, or predictions about the Employer's actual bargaining strategy We do not pass on our dissenting colleague's contention that List's hypothetical described "sham bargaining." As noted above, List did not imply, and we do not infer, that the Employer would engage in the same bargaining conduct as described in the exercise.

Dated, Washington, D.C. June 29, 2007

Peter C. Schaumber, Member

Peter N. Kirsanow, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER WALSH, dissenting.

I would adopt the hearing officer's finding that the Employer created the impression that it would be futile for the employees to select the Union. Accordingly, I would set aside the election.

The facts are not in dispute. One week before the election, the Employer's labor consultant, Peter List, held a meeting with some unit employees to conduct an "exercise" concerning collective bargaining. List told the employees that, during negotiations,

> an employer, by giving into lesser items or addendums on the contract, would be able to stall out the negotiations because they would still be bargaining in good faith but not really agreeing to anything, agreeing to things like a bulletin board for the union at the job site, agreeing to restricted bargaining unit work, things like that, that would make them show that they were bargaining in good faith but not really getting anything done.

List's statement was widely disseminated among the unit employees. The Union lost the election, 16 to 18, with 2 challenged ballots.

Contrary to my colleagues, I agree with the hearing officer that List's statement was objectionable. In essence, List told the employees that an artful employer could make an effective show that it was negotiating in good faith but in fact frustrate bargaining and ensure that the parties never reached agreement. The clear implication of List's statement was that if the employees selected the Union, the Employer would engage in, and get away with, sham bargaining. The hearing officer therefore properly found, and I agree, that the Employer effectively told the employees that it would be futile for them to vote for the Union.

Reasoning otherwise, my colleagues emphasize that List's statement was made "during an exercise involving hypothetical bargaining parties," that the remarks merely described the "possible pitfalls of the collective-bargaining process," and that List told the employees that "all negotiations are different." My colleagues therefore find that the employees would recognize that List's statement was not a forecast of the Employer's actual bargaining strategy, and therefore did not convey a threat.

But the majority's findings and conclusions do not ring true. List is an experienced antiunion consultant; his audience consisted of laypersons. And List said nothing to indicate that the Employer would eschew the bargaining approach he laid out. In the circumstances, it is not likely that the employees would regard List as speaking about "possible pitfalls" and "hypothetical bargaining parties." Rather, it is more reasonable that the employees would consider the statement within the context of their own employment, and infer that, should they reject List's antiunion campaign and vote for union representation, the Employer would nevertheless rely on this strategy to avoid ever coming to terms.

The cases cited by the majority do not support its conclusion. In *Days Inn Management Co.*, 299 NLRB 735 (1990), the Board did not find that the skit depicting collective bargaining was lawful simply because, as the majority asserts, "the employees understood that [the] skit . . . was merely an encapsulation of a longer and more complex process." Rather, the skit was lawful primarily because it "show[ed] the [r]espondent bargaining in good faith . . . ." Id. at 740. For that reason, the judge concluded that the skit was neither expressly nor impliedly threatening.[1] Similarly, in *Standard Products Co.*, 281 NLRB 141 (1986), enfd. in part, enft. denied in part on other grounds 824 F.2d 291 (4th Cir. 1987), where the employer stated that it would engage in hard bargaining if the union won the election, the Board deemed the statement unobjectionable because hard bargaining *is* lawful; sham bargaining is not. Id. at 163. Finally, although I dissented in *Manhattan Crowne Plaza*, 341 NLRB 619 (2004), that case, too, is different: the employer's statement there, describing what had happened in collective bargaining at another hotel was, at least, factually accurate. By contrast, List's remarks described a sham bargaining strategy that is patently unlawful. Contrary to the majority, no speculation is necessary to conclude that the employees would make the connection between the strategy

[1] My colleagues assert that, in *Days Inn*, the Board found that "employees can distinguish between a hypothetical exercise about bargaining and an employer's description of its . . . planned bargaining strategy." But the Board made no such blanket statement. Rather, in light of all the circumstances in that case–including the entry into the record of the complete script of the skit–the Board found that *those* employees "attending *this* skit understood that it was a brief encapsulation of a [longer] process . . . ." (Emphasis added.) It is quite a leap from that statement to the majority's claim here, that employees presented a skit by their employer depicting sham bargaining would understand that the employer did not intend to pursue such a strategy.

outlined by their employer's consultant and their own employment.[2]

In sum, in widely disseminated remarks, employer consultant List set forth a strategy for the Employer's "stall[ing] out" negotiations and "not . . . getting anything done," with impunity. The employees would reasonably infer that List was talking about their own workplace, and therefore understand that List was telling them that selecting union representation would be futile. Accordingly, in agreement with the hearing officer, I would set aside the election.

Dated, Washington, D.C. June 29, 2007

Dennis P. Walsh, Member

NATIONAL LABOR RELATIONS BOARD

[2] In my dissent in *Manhattan Crowne Plaza*, I concluded that the employer's statement, that "each set of negotiations is different," did not neutralize the threat directly preceding it. Id. at 620. That conclusion is equally apt here.